

FEDERAL CIRCUIT COURT OF AUSTRALIA

AIB16 v MINISTER FOR IMMIGRATION

[2017] FCCA 231

Catchwords:

MIGRATION – Application for judicial review – excluded fast track review assessment – bogus document – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5(1), 36, 46A, 47, 57, 65, 91W, 95, 473CA, 501, 501H

Migration Amendment (Protection and Other Measures) Act 2014

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014

Cases cited:

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152

SZLDG v Minister for Immigration and Citizenship [2008] FCA 11

Applicant:	AIB16
Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
File Number:	MLG 273 of 2016
Judgment of:	Judge Riethmuller
Hearing date:	28 October 2016
Date of Last Submission:	28 October 2016
Delivered at:	Melbourne
Delivered on:	17 February 2017

REPRESENTATION

Counsel for the Applicant:	Ms L. De Ferrari
Solicitors for the Applicant:	Victoria Legal Aid
Counsel for the Respondent:	Mr N. Wood
Solicitors for the Respondent:	Australian Government Solicitor

ORDERS

- (1) The application be dismissed.
- (2) The Applicant pay the First Respondent's costs fixed in the sum of \$7,206.00.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 273 of 2016

AIB16

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

Respondent

REASONS FOR JUDGMENT

1. On 20 January 2016, the Minister’s delegate made a decision declining to grant the applicant a protection visa pursuant to the *Migration Act 1958* (the “Act”). The Minister declined to forward the application for review in accordance with section 473CA of the Act on the basis that it fell within the definition of an “excluded fast-track review assessment” as a result of a finding that the applicant provided a bogus document. The applicant seeks judicial review of the Minister’s decision.

The Legislative Scheme

The ‘fast-track’ process

2. In 2014, legislation was passed amending the Act, providing for a process described as the ‘fast-track review assessment process’. This process was implemented by the *Migration Amendment (Protection and Other Measures) Act 2014* and the *Migration and Maritime*

Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.

3. In the explanatory memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, the Minister said:

The fast-track assessment process introduced by schedule 4 of this bill will efficiently and effectively respond to unmeritorious claims for asylum and will replace access to the Refugee Review Tribunal with access to a new model of review, the Immigration Assessment Authority – to be known as the IAA. These measures are specifically aimed at addressing the backlog of IMAs – some 30,000 – and will ensure their cases progress towards timely immigration outcomes, either positive or negative.

4. The second reading speech explained that:

... However, it is the government's policy that, if fast-tracked applicants present unmeritorious claims or have protection elsewhere, their cases will be channelled towards a direct immigration outcome rather than accessing the broader merits review process to prolong their stay in Australia. Such fast-track applicants will be known as 'excluded fast-track review applicants' and will not have access to those broader forms of merits review.

The IAA will be established as a separate office of the Refugee Review Tribunal. Eligible fast-track review applicants will have their refusal cases automatically referred to the Immigration Assessment Authority and will not have to apply for a review by it. The IAAs primary function will be to conduct a review 'on the papers', only considering the material which was before my department when it made its refusal decision under section 65 of the Migration Act.

5. The second reading speech went on to note that there may be cases where, for genuine reasons, an applicant does not present all of their claims at first instance and that there are limited discretionary bases upon which further information may be accepted by the Immigration Assessment Authority (the "IAA"). Importantly, the Minister stated:

The new approach to review will discourage asylum seekers who attempt to exploit the current review process by presenting manufactured claims or evidence to bolster their original

unsuccessful claims only after they learn why they were found not to be refugees by the Department. This behaviour has on numerous occasions led to considerable delay while new claims are processed.

6. In the second reading speech to the *Migration Amendment (Protection and Other Measures) Bill 2014*, the Minister said:

Establishing an applicant's identity is a keystone of making a decision to grant or refuse any visa. This is especially the case for protection visa applicants because their identity, nationality or citizenship can have a direct bearing on whether they engage Australia's protection obligations. Identity in the global age is increasingly complex to determine and many people hold dual or multiple nationalities or seek an advantage from not disclosing their genuine identity. This bill introduces amendments that enhance the process of establishing identity for protection visa applicants, and addresses the ways in which that process has been frustrated in the past. Changes to section 91W of the Migration Act, and the introduction of a new section 91WA, introduce a power to refuse the grant of a protection visa unless the applicant provides documentary evidence of their identity, nationality or citizenship when requested to do so, or has taken reasonable steps to do so. Presenting bogus documents for the purpose of establishing identity will result in refusal of a protection visa application unless the applicant has a reasonable explanation for presenting them and either provides documentary evidence of their identity, nationality or citizenship, or has taken reasonable steps to do so. The same applies to an applicant who has destroyed or discarded identity documents, which has been a common practice of those who have entered Australia illegally, or has caused that to happen at the hands of another person such as a people smuggler.

It is appropriate to refuse a protection visa where an applicant fails or refuses to comply with a request to establish their identity, where it is in fact possible for them to do this. These measures make it clear that Australians expect protection visa applications to be made in good faith, and with full disclosure of identity. However, the proposed changes also respect the fact that in some circumstances, including some cases where a person is stateless, it may not be possible for a protection visa applicant to provide documentary evidence of their identity, nationality or citizenship, even if they want to and have taken all reasonable steps to do so. These changes understand and respect that position. Cooperation in these matters is the key in these cases.

7. This arrangement has been implemented in the legislation by the addition of two definitions in s.5(1) of the Act, being “fast-track review applicant”, and “excluded fast-track review applicant”.
8. In this case, the applicant initially fell within the definition of a fast-track review applicant as a result of arriving by boat in a particular timeframe defined in the definition. He then was said to fall within the excluded fast-track review applicant definition as he was a person:

(a) who, in the opinion of the Minister:

...

(vi) without a reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application; ...

9. The importance of these definitions is that a fast-track review applicant receives a decision by a delegate of the Minister which automatically proceeds by way of review to the IAA if the decision is not in favour of the applicant. However, if the applicant falls into the excluded group, the applicant has no merits review option and can only seek judicial review of the delegate’s decision.

Power to grant or refuse visas

10. The general scheme of the Act with respect to the powers to grant or refuse a visa remain intact: applications must be considered and dealt with by the Minister (or delegate) pursuant to s.47 of the Act until the Minister (or delegate) ultimately determines whether or not to grant a visa under s.65. Section 65 provides:

(1) Subject to sections 84 and 86, after considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 91W (evidence of identity and bogus documents), 91WA (bogus documents and destroying identity documents), 91WB (applications for protection visas by members of same family unit), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

Note 1: Section 84 allows the Minister to suspend the processing of applications for visas of a kind specified in a determination made under that section. Section 86 prevents the Minister from granting a visa of a kind specified in a determination under section 85 if the number of such visas granted in a specified financial year has reached a specified maximum number.

Note 2: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

Note 3: Decisions to refuse to grant protection visas to fast track review applicants must generally be referred to the Immigration Assessment Authority: see Part 7AA.

(2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

11. In this case, the delegate sought information from the applicant as to his identity, and in doing so made a request for documents that engaged s.91W. Section 91W provides:

(1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for

inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.

(2) The Minister must refuse to grant the protection visa to the applicant if:

(a) the applicant has been given a request under subsection (1); and

(b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and

(c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and

(d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:

(i) refuses or fails to comply with the request; or

(ii) produces a bogus document in response to the request.

(3) Subsection (2) does not apply if the Minister is satisfied that the applicant:

(a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and

(b) either:

(i) produces documentary evidence of his or her identity, nationality or citizenship; or

(ii) has taken reasonable steps to produce such evidence.

(4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

The circumstances of this case

12. The applicant claims to be a citizen of Iran. He arrived in Australia on 11 October 2012. The Minister lifted the ban on him applying for a protection visa under s.46A in May 2015. In July 2015, he made an application for a protection visa in the name of [S1]. The applicant claimed that he was in fear of Iranian authorities as a result of working at a military complex southeast of Tehran because he was found with a telephone containing photographs that he had taken from within the complex and he was required to hand in any telephone before entering the complex.
13. The applicant also relied upon copies of Iranian court documents with translations referring to the name [S1]. On 25 August, the applicant was requested to provide originals of any identity documents that he held, and he provided a driver's licence in the name of [S1].
14. By October 2015, the driver's licence had been assessed to be a fake and was said to be counterfeit. The applicant was sent a letter pursuant to s.57 of the Act affording him an opportunity to comment upon this issue. The applicant responded in November 2015, attaching a copy of a driver's licence that he said was in his true name [S2].
15. A further letter under s.57 was sent in December 2015 affording him an opportunity to comment upon three significant matters set out in the letter as follows:

*You were previously requested to produce documentary evidence of your identity, nationality or citizenship for inspection by an officer of the department under section 91W(1) of the Migration Act 1958 (the Act). When this request was made, you were given a warning that the Minister cannot grant a protection visa to you if you refuse or fail to comply with the request **or produce a bogus document** in response to the request.*

The original driver's licence you provided to the department on 9 September 2015 in response to the 91W(1) request (using the name [S1]) has been assessed to be a bogus document. A bogus document, in relation to a person, means a document that the Minister reasonable suspects is a document that:

a) purports to have been, but was not, issued in respect of the person; or

b) is counterfeit or has been altered by a person who does not have authority to do so; or

c) was obtained because of a false or misleading statement, whether or not made knowingly.

The document you provided contacted characteristics of concern and was referred to the department's Document Examination Unit (DEU) for assessment. The DEU has assessed the document to be counterfeit as some of the security features are missing or not consistent with genuine documents. Furthermore, some of the characteristics of the production of the document are not consistent with genuine examples of Iranian Driver's Licences.

This information is potentially adverse to your application for a protection visa for the following reasons:

- It supports the assessment that you may have provided the department with a false identity.*
- It supports the assessment that the court documents you provided to the department as evidence of your claims are also bogus.*
- It potentially undermines your overall credibility regarding your claims and other information you have provided to the department in support of your claims.*

If it is assess that you have produced a bogus document in response to the section 91W(1) request, and you do not have a reasonable explanation for producing the bogus document, then your visa application must be refused under section 91W(2) of the Act.

*I also wish to advise you that failure to provide a reasonable explanation for producing a bogus document to an office of the Department of to the Minister may result in you being determined to be an **excluded fast track review applicant**, as defined by Section 5 of the Act.*

Opportunity to provide a reasonable explanation for producing the bogus document

I am writing to give you an opportunity to provide a reasonable explanation for producing a bogus document, and to either:

- produce documentary evidence of your identity, nationality or citizenship; or*

- *take reasonable steps to produce such evidence.*

If the Minister is not satisfied that you have a reasonable explanation and you do not produce documentary evidence, or take reasonable steps to produce such evidence, then your visa application must be refused under section 91W(2) of the Act.

I am also inviting you to provide comment on why you should not be considered an excluded fast track applicant.

16. The applicant responded to these letters in a number of emails, which appear at Court Book pp.159, 162 and 169. The substance of the applicant's explanation was that he remained fearful that the Iranian regime would find him and bring him back to Iran.
17. The applicant said, on 2 November 2015, that he left Iran with a fake passport and had to live under another name but did not mention it as he thought it may be too late by the time of the interview. He reiterated that all of the other information was correct. The applicant explained in some detail his fear of being sent back to Iran relying upon this as the reason why he did not:

...tell my real name to anyone because I was thinking I can be in serious trouble if Iranian regime find out where I am. Everyone in Australia knows me by [S1] name, even my housemate. I was too scared to tell the truth to anyone.

18. The delegate found that a fake document was provided, and as a result, the prohibition against the grant of a visa under s.91W was engaged. The delegate did not find that all of the documents provided pursuant to the section were bogus documents within the meaning of the section, but did conclude that the fake driver's licence was a bogus document. In reaching this conclusion, the delegate carefully considered whether or not there was a reasonable explanation (see paragraphs [10] to [26] of the reasons). Having considered the explanations given by the applicant, the Tribunal member concluded that a reasonable explanation had not been provided.
19. It was argued that the delegate focused upon the applicant's explanation with respect to his fear as the basis for the applicant's reasonable explanation, rather than the statement in the applicant's

explanation (quoted above) that “Everyone in Australia knows me by [S1], even my housemate.”

20. It is difficult to see, in the context of this case, that on any reasonable reading of the applicant’s email, that it was intended to suggest that when his identity documents were sought that the provision of a fake Iranian driver’s license was carried out simply on the basis that that was the name by which people in Australia knew him. Similarly it is difficult to conclude that this of itself could be sufficient to be a reasonable explanation in the circumstances of a case such as this. Read in context, the statement is evidence to corroborate the claim that he told no one his real name. It does not appear to be some form of a separate basis for explaining his provision of a bogus document. It is also notable that there was no evidence of statements made to the decision maker that place this statement in a context that would elevate it to a separate claim.
21. The delegate went on to consider the other factors that are necessary for the grant of a protection visa, even though s.91W prohibited such a visa being granted. The delegate did not accept the claims by the applicant, setting out findings in considerable detail, including details of the applicant’s version of events that the delegate found implausible. For example, the claim that when the applicant carried out work as a carpenter or joiner on a military base he was the employee of a contractor whose full name he did not know, and that after he had been in custody he was released into the custody of this contractor who took him home to his house in order to retrieve materials from the applicant’s workshop and then sought to return him to custody.
22. The applicant also alleged that whilst his genuine driver’s licence had been in his motor vehicle at the time the vehicle was confiscated by authorities, a friend had retrieved his license from the impounded car. The applicant claimed that despite his car being searched, officials failed to locate the license but that his friend gained access to the car as it was not in a car park compound, but an open car park and his friend could use a spare set of keys. Not surprisingly, the delegate found this version of events implausible.
23. With respect to the passport, the applicant had informed the department initially that the name on the passport he used to depart from Iran was

[S2], the name he ultimately admitted was his true identity. At the hearing with the delegate he had changed his version of events to claim that the name on the passport he left on was [S1].

24. As a result of the rejection of the applicant's credibility with respect to his version of events, the delegate ultimately concluded that he did not satisfy the protection visa provisions (including s.36 of the Act) for the purpose of the grant of a protection visa.
25. The delegate then went on to consider whether or not the applicant was an excluded fast track review applicant, concluding that he was excluded as a result of the findings with respect to the counterfeit licence.

Grounds of the Application

26. The applicant relied upon several grounds in the judicial review application. It is appropriate to deal with each in turn.

Ground 1

27. Ground 1 states:

The decision that the applicant is an 'excluded fast track review applicant' (the EFTRA assessment), is vitiated by jurisdictional error.

Particulars

The jurisdictional fact of a 'bogus document' provided by the applicant 'in support of his or her application' did not exist.

28. In this ground, the applicant argues that documents supplied as a result of a request under s.91W are not documents in support of his or her application as the applicant was required to provide the documents under the section.
29. The Act provides a process to formally request identity documents, which is directed to a central issue in determining whether or not to grant a protection visa to a person. That is, it must necessarily be central to know the true identity of the person seeking a protection visa. The provision of documents in response to such a request is the provision of documents to support the application. In any event, in this

case, a copy of the false driver's license was supplied with the initial visa application prior to the request under s.91W.

30. It was also argued that even if the documents required to be produced by the request under s.91W fell outside of the definition of documents provided in support of an application, that this did not cover bogus documents provided by the applicant in response to the request under s.91W. To the extent that there is any compulsion to produce documents as a result of a request under s.91W, it is for documentary evidence of the applicant's identity, not for the production of bogus documents. By providing a bogus document the applicant had not satisfied the request but provided a document outside the terms of the request in order to continue to pursue his visa application. In this sense the documents provided were provided voluntarily as they were outside the ambit of the documents covered by request.
31. In the circumstances I find no merit in this ground.

Ground 2

32. Ground 2 was framed as follows:

The EFTRA assessment was made in breach of s 57 of the Act.

Particulars

The delegate failed to give to the Applicant particulars of the information which he used adversely to the Applicant in making the EFTRA assessment.

33. The applicant submitted that the second letter issued under s.57 was "*Hopelessly confusing, insofar as it attempted to further deal with section 91W of the Act*" as it "*could not, and did not,[afford] an opportunity to the applicant to give an explanation for why he had produced that document*".
34. It was difficult to understand this claim in light of the terms of the second letter as set out above in this judgment. In argument it became clear that the proposition being put was that the third dot point in the letter (where the delegate set out that one of the reasons that the information was potentially adverse to the applicant's application was that it undermined his overall credibility) was the source of complaint.

It was argued that the letter should have been confined to the issues under s.91W and not sought to afford the applicant an opportunity to also comment upon how the provision of a bogus identify document may affect his credibility more generally in his claim for a protection visa.

35. I am not persuaded that the drafting of this document was such as to be confusing or to impede the applicant having a real opportunity to provide further material and explanations. It appears to me that the letter was quite clear, and exhibits a genuine effort to provide the applicant with a clearly stated explanation of the significant issues flowing from providing the bogus document. Those issues were not confined to s.91W as the bogus document could affect his credibility generally and undermine his claim even if he succeeded on the s.91W point.
36. The applicant sought to draw a distinction between the operation of s.57 and the common law rule with respect to procedural fairness, arguing that whilst this letter may comply with s.57 it breached common law principles. I am not persuaded that this letter would be outside common law principles. The letter is a straightforward statement of the issues confronting the applicant and, in my view, more than adequate to satisfy not only s.57, but any common law procedural fairness requirement (if in fact, as matter of law, there is any common law procedural fairness requirement in this context). As I am satisfied that the letter would satisfy both tests, it is not necessary for me to make any decision as to whether or not there is a common law procedural fairness obligation in this context.

Ground 3

37. Ground 3 of the application is framed:

The decision refusing the applicant the grant of a protection visa under s 91W of the Migration Act 1958 (the s 91W refusal decision), is vitiated by jurisdictional error; namely misconstruing s 91W.

38. The applicant claims that the Tribunal member erred in considering whether or not the applicant had a reasonable explanation by turning to address the questions of whether or not as a matter of fact the applicant

had a well-founded fear of harm from the Iranian authorities. In the context of this case, it is clear that his claim of fear from harm by the authorities was the basis of his explanation for providing the bogus document. This was considered in detail by the delegate, expressly referring to the explanation in the reasons at paragraphs [17] and [22]. I am not satisfied that the applicant has established a ground for judicial review in this respect.

39. It was argued that by considering the substantive matters relating to the applicant's fear of harm at the time of considering whether or not he had a reasonable explanation, the delegate had gone beyond the ambit of s.91W, and that as a matter of law s.91W had to be considered prior to determining those other matters. The operation of s.91W, if engaged, can be such as to prevent the Minister from granting a visa under s.65. Thus the argument is that the s.91W issues must be dealt with first.
40. On a practical level, the delegate in a case such as this is required to make a number of findings of fact from the material in order to provide a proper foundation for applying the applicable legislative provisions. As is not uncommon in the law, the findings of fact may be relevant to the application of more than one legal test. In this case, the findings of fact as to whether or not the applicant was at risk of harm were relevant not only to the substantive visa conditions, but also the reasonableness of any explanation for providing bogus documents. The applicant's claim to fear harm was the explanation he gave for having provided a bogus document.
41. To attempt to confine the findings and considerations to s.91W prior to turning to consider the other matters required by s.65, at least in the context of this case, appears to me to be an artificial process. Given that the delegate must make determinations of fact and law, it is appropriate for the delegate to determine the various facts that are relevant, and then apply the statutory tests. If, as in this case, that process results in s.91W prohibiting the grant of the visa, that does not make the findings of fact that may be relevant to the balance of the potential issues a source of jurisdictional error.

Ground 4

42. The applicant's fourth ground was framed as follows:

The s 91W refusal decision was made in breach of natural justice.

Particulars

The delegate's letter of 17 December 2015 did not satisfy the natural justice obligation of affording an opportunity to the applicant to give an explanation for why he had produced a 'bogus document'.

The delegate's letter of 17 December 2015 did not put the applicant on notice as to how or why either of the 'court documents', or a 'potential undermining' of his overall credibility and/or other information which he had provided to the Department (which information is not identified), might be relevant to a decision to refuse him the grant of a visa under s 91W

43. This argument is comprehensively answered by counsel for the Minister in his outline as follows:

53. There are numerous fundamental problems with the applicant's argument.

*54. First, the delegate does not have a common law natural justice obligation to give the applicant an opportunity to "explain why he had produced" the bogus document. As noted in paragraph 24 above, the content of the natural justice hearing rule that applied to that decision-making process was affected by section 51A, which provides that Part 2 Division 3 Subdivision AB of the Act "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with." [Footnote: As to the meaning and significance of that expression, see *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [35]-[42]. "[A] consideration of all the words 'the matters it deals with' directs attention to provisions within the subdivision or the group of sections which are operative". For each of these provisions, it is necessary to characterize the "matter" with which the provision is concerned: those aspects of the natural justice hearing rule are exhaustively codified.] One of the "matters" that Subdivision AB "deals with" is the obligation of the Minister to give to an applicant adverse information. The delegate complied with that obligation.*

55. Secondly, the applicant asserts that the delegate provided the “second procedural fairness letter” “only because he considered he had failed, at common law ..., to give the Applicant an opportunity to comment on why he should not be found to be an ‘excluded fast track review applicant’”. That is incorrect. Nowhere does the delegate refer to “common law” procedural fairness, or say that he had failed to comply with it. The delegate simply noted that his letter ought to have advised the applicant that the information that the applicant had provided a bogus document might be relevant both to whether the delegate might refuse to grant the visa application, and whether the applicant was an excluded fast track review applicant (CB 170).

56. Thirdly, the applicant's argument is internally incoherent. If, as the applicant concedes, the first procedural fairness letter was “clear, concise, to the point”, and that letter “satisfied both s 57 and the [alleged] natural justice obligation” and “[t]he applicant responded to” it, then how could the provision of the “second procedural fairness letter” (even if it was “confusing”) somehow mean that the delegate denied the applicant natural justice? It cannot. The concern of the law of procedural fairness is to avoid “practical injustice”. “Fairness is not an abstract concept. It is essentially practical.” [Footnote: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [38].] Where the applicant concedes that he was given a letter that complied with the delegate's natural justice obligation, and he took the advantage to respond to that letter, then has not suffered any practical injustice.

57. Fourthly, and in any event, the delegate's “second procedural fairness letter” was not “confusing”. It is quite obvious why the fact that the applicant had provided a “false identity” to the Department might undermine his credibility (CB 166). Similarly, it is quite obvious why the fact that the applicant had provided a bogus Iranian driver licence in a false name [S1] suggested that the purported court summonses also provided by the applicant in that same false name [S1] were likewise bogus (CB 166). Furthermore, the applicant appears to have suffered no “confusion.” On 14 January 2016, in response to the “second procedural fairness letter”, the applicant stated: “All these court summonses I provide to the department are original and stated that I was being charged with action against Iranian regime, I had to pay someone to change the name of them cuz they were under [S2] name witch is my real name! And I swear they all are original!” (CB 169)

44. As set out above I am of the view that the letter would satisfy the common law obligation even if it did apply. I accept the force of the Minister's submission that the common law obligation does not apply, however in the context of this case, I do not need to make a formal finding in this regard. With respect to the third and fourth point the Minister makes in this regard, I accept the arguments of the Minister.

Ground 5

45. The fifth ground relied upon by the applicant deals with section 65 of the Act:

The decision refusing the applicant the grant of a protection visa under s 65 of the Migration Act 1958 (the s 65 refusal decision) was made without power.

Particulars

The delegate had made the s 91W refusal decision. There was no longer an undetermined valid application for a visa. There was no longer any power to refuse (or grant) a visa to the applicant.

46. This argument is a technical one as to whether or not the refusal of the visa occurred upon making the relevant findings under s.91W or thereafter under s.65. The applicant argues that the process came to an end on the basis of the findings made under s.91W and that s.65 no longer applied at that point.
47. Counsel referred to a decision of Lindgren J in *SZLDG v Minister for Immigration and Citizenship* [2008] FCA 11. This case concerned the operation of s.501 of the Act. Section 501 provides the Minister with a discretion to refuse to grant a visa on character grounds. Section 501H makes clear that the power to refuse to grant a visa under section 501 is in addition to any other power under the Act.
48. Counsel referred specifically to paragraphs [80] to [83] where his Honour made clear that where a delegate only has power under section 65 (and not section 501) their role is limited to considering whether or not section 501 prevents the grant of the visa. The delegate with powers only under section 65 but not delegated powers under section

501 could exercise their power to refuse to grant a visa under s.65 due to the interrelationship between the two sections.

49. These issues do not arise in this case as the delegate had power under ss.65 and 91W. Secondly, s.501H makes clear that the powers under s.501 were in addition to any other power under the Act. A similar provision does not appear with respect to s.91W.
50. Whether the refusal is an exercise of the power under s.91W(2) or s.65 is not a question which, as it appears to me, makes a difference on the outcome of this particular application. Whether the refusal was an exercise of the s.91W power or the s.65 power is moot as on either version the provision by the applicant of the bogus document (without a reasonable explanation) was a proper basis for the Minister's delegate to refuse to make a decision in the applicant's favour under either section. It is appropriate for this fine distinction to be addressed in a case where it is necessary to do so – that is where the decision will affect the outcome.

Ground 6

51. Ground 6 of the application was framed as follows:

(If there was power to make it), the s 65 refusal decision is vitiated by jurisdictional error, namely failure to consider a claim.

Particulars

The claim that the applicant's father, who has been in the military, will hand the applicant over to the Iranian authorities or kill the applicant himself, and that the applicant had a well-founded fear/there was a real risk that the applicant would suffer significant harm, has not been considered.

52. The application argues that the applicant claimed that if he were to return to Iran his father would hand him over to the Iranian authorities or kill him himself. As counsel for the Minister points out, the claim was that the applicant's father was an unemployed drug addict who was angry or ashamed of the applicant as he felt the applicant had usurped his role as the head of the family by operating his carpentry business

and as a result would either hand him over to the government or kill him (see Court Book p.159).

53. The delegate rejected the fundamental premise of the applicant's claim in this regard on a number of bases as set out in paragraph [71] of the decision where the delegate said:

71. I am not satisfied the applicant left school at the age of 16 to work for a carpenter and opened his own business at the age of 18. I am not satisfied that the applicant was truthful when he claimed that he left school to support his family because his father is a drug addict; this claim contradicts his other claim that he was able to gain a military service exemption and therefore opened his own business at 18 because his father was in the military and over 50. Furthermore, at the time the applicant claims he gained a military service exemption his father was 46 years of age. The applicant provided little information about the man under whom he allegedly trained, including his business address. When questioned about his alleged business, the applicant stated that it was unregistered, had no name, had no registration or contract paperwork to prove its existence; and it relied on gentleman's agreements with persons whose names he didn't fully know. The applicant's problematic account of his training and his business is critically undermines the premise for the claimed circumstances that led to the applicant's arrest.

54. I am not persuaded that this ground establishes a basis for a finding of jurisdictional area, where the factual foundations for the claim have been rejected.

Ground 7

55. In support of ground 7 the applicant relies upon a claim that there was a breach of "natural justice". The ground is framed as follows:

(If there was power to make it), the s 65 refusal decision was made in breach of natural justice.

Particulars

The delegate failed to put the applicant on notice that his failure to prove possession of a passport, military service completion card, or shenasnameh in the false name of [S1], would be used against him

56. None of the rules of procedural fairness, nor the procedural rules contained in the Act, require a delegate to provide an applicant with a running commentary upon what the delegate thinks about the evidence that is given. “On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of pre-judgment.”: See *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [48].

57. The relevant reasoning of the delegate appears at paragraph [23] where the delegate says:

23. As I am not satisfied the applicant was wanted by Iranian authorities at the time of his departure, I am not satisfied the applicant needed to conceal his true identity from Iranian authorities in order to depart the country. Consequently, I am not satisfied the applicant required and acquired a bogus passport. At his TPV interview, the applicant claimed that he fraudulently obtained a genuine passport using the services of men named Faramaz and Farmani. The applicant claimed that these men produced a fake birth certificate (shenasnameh) and military service completion card, with Faramaz accompanying him to the passport office. He claims he received his passport from authorities several days later. However, the applicant has not provided the department with any evidence that he was once in possession of a passport, military service completion card, or shenasnameh in the name of [S1], the false identity he provided to Australian authorities, including the Department of Immigration and Border Protection. Country information indicates that when applying for a passport in Iran, Iranian male citizens over 18 must submit their shenasnameh, national identity card, and military service completion card to the issuing authorities. 1 The national identity card is a distinct document, not a category of documents that potentially includes a driver's licence. 2 The Department of Foreign Affairs & Trade (DFAT) advised in 2011 that at the time of departure from Iran, “[w]here there is doubt about a person's identity, or their passport, they may be asked to provide another piece of identification. This could include a driver's licence, or identity papers.” 3 On this basis, a driver's licence might occasionally be required in addition to a passport in order to depart Iran. However, a shenasnameh, national identity card, and military service completion card would still be needed to be provided to the issuing authority in order to acquire a passport. The applicant has provided no evidence to the department that he had such documents manufactured, let alone for the purpose of acquiring a passport under a false name in

order to depart Iran. The only evidence of bogus documents the applicant has provided to the department is in the form of a bogus driver's licence and two bogus court documents. As I am not satisfied that the applicant is wanted by Iranian authorities or had a bogus passport, shenasnameh and military service completion manufactured, the logical assessment is that the applicant produced a bogus driver's licence and bogus court documents primarily for purpose of deceiving Australian authorities; not for the purpose of departing Iran.

58. In this case there was ultimately no dispute that the driver's license that the applicant had provided to the department was a false document, and it is clear that the applicant was placed on notice of this. In the context of this case, this issue potentially undermined his overall credibility.
59. In giving notice to the applicant on 17 December 2015 (in addition to the other matters set out in that letter) it appears to me that the delegate has gone beyond the minimum that was required by the Act, although certainly not crossed the line of potentially conveying any impression of pre-judgment. Clearly the facts and circumstances of the applicant's departure from Iran and the documents that he provided were not such that it could be considered that he applicant would have been taken by surprise by the terms of the decision or the nature of the evidence that was considered. In these circumstances I am not persuaded that the applicant has made out this ground.
60. The final matter argued was whether or not the delegate declining to refer the matter to the IAA was a decision within the meaning of the Act or not. Counsel for the Minister argued that it was a separate decision from the decision to refuse the visa that was amenable to judicial review. To the extent that it was, it is clear that in the visa decision the Minister's delegate had formed the view that a bogus identity document had been provided and that there was no reasonable explanation, and therefore the requirements of the definition were satisfied (as are relevant to this decision).
61. Whether the matter is best determined on the basis that the decision not to refer the case to the IAA is a separate decision, or the court simply considering an application for a writ of Mandamus to require the decision to proceed to the IAA, is not a matter that I need to determine in this case as it is clear that the applicant is an excluded fast track

applicant. To the extent that this is the subject of a separate decision by the delegate, this is dealt with at paragraphs [22] to [25] of the delegate's decision. To the extent that it is part of the original decision or a separate decision I find there is no judicially reviewable error on the part of the decision maker as the finding of fact results in the applicant being excluded.

62. Even if there is an error of law in this case with respect to which of s.91W and s.65 applies, relief should be refused as the findings of fact could only lead to the one outcome.
63. In the circumstances I therefore refuse the current application for judicial review.

I certify that the preceding sixty-one (61) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller

Date: 17 February 2017